CHIMINYA
and
MURAHWO
and
MUDZVITI
and
DUMBU
and
SABHUKU CHANGAMIRE
versus
MAPETERE VINCENT DZIVA MAWERE

HIGH COURT OF ZIMBABWE
WAMAMBO AND ZISENGWE JJ
MASVINGO, 1 July 2020, 18 February 2021 and 21 March 2022

Civil Appeal

G Bwanya, for the appellants
J Chipangura, for the respondent

WAMAMBO J: At the end of the hearing of this appeal we gave an *ex tempore* judgment wherein we dismissed the appeal with costs. We have now been requested to issue full reasons for the said judgment.

Here are our reasons. The respondent instituted proceedings in the Magistrates Court to evict the respondents from Tokwe Grange Farm.

According to the founding affidavit the respondent avers as follows:
He is the owner of Tokwe Grange Farm, Masvingo (hereinafter called the farm). He bought it from Tokwe Grange Commercial Centre in 1996. Thereafter he was handed over the title deeds for the same farm. He also holds a Certificate of Registration of Brands in terms of the Brands Act [*Chapter 19:03*] and pays unit tax with Masvingo Rural District Council. Between 18 and 20 August 2018 he observed that the appellants were illegally occupying the said farm. The appellants had erected eight houses without his consent and were cutting down trees. Upon an enquiry, the respondent was informed that the appellants were in occupation through fifth appellant. He has tried to obtain assistance from the police to no avail. First appellant claims his right of occupation through Chief Charumbira.

In opposition through first appellant, appellants averred that the respondent is not the owner of the farm. First appellant avers that he does not reside within the farm but on a piece of land adjacent to the farm in dispute. He produced a letter authored by Chief Charumbira. The farm was repossessed by the Government from Ronald Eustace Vincent and Andrew Clive Vincent through the land resettlement programme. Tokwe Grange Commercial Centre (also called Bhati Business Centre) was sold to Chigudu (now late) who supposedly sold it to the respondent. If there was such a sale it was a nullity as the farm was repossessed and allocated to different Chiefs. The second to fifth appellants were allocated the land they currently occupy by Chief Mapanzure. The appellants are of the firm view that the farm is State land and the various portions were allocated to them legally.

The respondent has no capacity to evict the appellants for the farm is State land and he holds no title to it. The respondent should have transferred the farm into his name but cannot as the farm is State land.

Faced with the above summarised versions, the learned Trial Magistrate found for the appellant and ordered the eviction of the appellants. The learned Trial Magistrate canvassed the principles of *rei vindicatio* and cited case law. The trial magistrate was satisfied that the agreement of sale between the respondent and Tokwe Grange Commercial Centre, the title deed in the name of Tokwe Commercial Centre, the site plan, the certificate of brands and proof of payment of tax by the respondent to Masvingo Rural District Council supported the respondent's case. In an analysis of respondent's evidence along with the evidence of the District Administrator, the Lands Officer and the trial court found cogency in their evidence.

On the other hand the trial court was unsure about the position of Chief Charumbira in the dispute. The Chief was also not called to testify. The trial court found the evidence of the appellants to be contradictory. The court also found that as opposed to respondent's supporting documents, the appellants proffered no substantial evidence in support of their case as owners or rightful occupants of the farm.

The appellants were dissatisfied with the findings of the Trial Magistrate registered this appeal. In the notice and grounds of appeal they raised four grounds. The grounds are regurgitated below.

"1. The learned Magistrate erred when it relied on fraudulent and void agreement of sale purported to have been made between the respondent and Tokwe Grange Commercial Centre (Pvt) Ltd as proof of ownership of Tokwe Grange measuring 301.5338 hectares held under Deed of Transfer No. 4284/85.

2. The learned Magistrate erred in ordering eviction of the appellants in the absence of evidence of the Surveyor General's Office on whether the appellants were settled

within the boundaries of 301.5338 hectares of Tokwe Grange or were occupying the communal land adjacent to Tokwe Grange Farm.

3. The learned Magistrate erred by disregarding the evidence of the appellants to the effect that they were legally settled within the boundaries of the then Tokwe Grange Farm acquired by the State in terms of Rural Lands Act.
4. The learned Magistrate erred in failing to take note that the appellants were improperly cited and its order is not enforceable."

It appears that the trial Magistrate was correct to identify that the respondent sought eviction based on the principle of *rei vindicatio*.

In *Tapson Madzivire v Officer-In-charge Vehicle Theft Squad N.O. and 4 Ors* HH 352-2020, MANGOTA J had occasion to state as follows:

> "The principle of rei vindicatio is an action brought by the owner of the property to recover it from any person who retains possession of it without this consent. It derives from the principle that an owner cannot be deprived of his property without his consent."

In *Chetty v Naidoo* 1974(3) SA 13(A) the Court stated of the vindicatory action as follows:

> "It is inherent in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner like a right of retention or a contractual right. (emphasis added)
>
> It is evident from a reading of the above case authorities that vindication is associated with ownership. A person vindicates what he owns. He does not vindicate what he possesses."

Against this postulation of the legal principles attached to vindication I will consider the grounds of appeal separately.

Ground 1

The agreement of sale is attacked as being fraudulent. Various reasons are given for this. I will not examine all of them in detail as some amount to just raising dust. The long and short of it is that the respondent claims ownership of the farm through among other things the particular agreement.

The agreement was authored by a firm of legal practitioners namely Chuma, Gurajena and Partners and it is between Tokwe Grange Commercial Centre and respondent. The merx at the centre of the agreement is Tokwe Farm and Garage. The purchase price is given as $ 450 000. While the font at p 1 appears different from the font at pages 2 and 3 of the agreement of sale it is clear that the paragraphs and content are continuous. The seller and purchaser's signatures along with the witnesses' signatures are appended. There could be many reasons

why there is a difference in the font. One of them is that pages 2 and 3 contain standard clauses on such contracts and are appended as a matter of cause.

This agreement of sale lays the basis of the respondent's ownership of the farm in question. The agreement of the sale does not stand alone. It is buttressed by a deed of transfer in favor of Tokwe Grange Commercial Centre (Pvt) Ltd the very party who appears as the seller.

I find in the circumstances that although the respondent did not change ownership of the farm officially he holds rights in terms of the agreement as the owner of the farm. The reasons given by the Trial Court for accepting the agreement of sale as proof of ownership are thus unassailable.

On the second ground of appeal I am not convinced that because the Surveyor General did not give evidence on whether the appellants were settled within the boundaries of the farm or not, he erred.

It is unclear in the first place how the Surveyor General's evidence would assist the appellants. It becomes even more blurry when one considers the appellant's prevaricatory positions. In one breath the appellants contend that they are settled within respondent's farm after being authorised by the Chiefs. In another breath they contend that they occupy land adjacent but not with respondents farm. To add to the confusion in their heads of argument the appellants concede that the farm in question is owned by the respondent. In paragraph 3.7 of appellant's heads of argument it is stated as follows:

> "What these documents also show however is that respondent is the owner of a certain Tokwe Grange Farm measuring 301,5338 hectares".

Once the ownership of the farm by respondent is accepted by the appellants and indeed there are documents to support that position, as postulated above the issue of ownership dies away.

In the circumstances I also find that this ground of appeal has no merit.

The third ground postulates that the appellants were legally settled within the farm. As observed by the Trial Court and earlier in this judgment the appellants were inconsistent on whether they occupied the farm or occupied adjacent portions to the farm.

The respondent gave evidence that the appellants occupied his farm. He testified that he was knowledgeable of the pegs of his farm. His further evidence was that it was only after he reported the presence of the appellants to the police that they obtained a letter of support from Chief Charumbira. The letter forms an integral part of the appellants' stance in the case.

The said letter identifies the land allocated by the Chief to Kenneth Chimunya (apparently first appellant) as being situated at the intersection of Ngomahuru–Beitbridge Road, Tokwe Grange Farm to the north and Godobwe to the east.

The letter speaks only to first appellant and none of the other appellants. On what authority then do the other four appellants claim ownership to the land they occupy? The letter by the Chief did not say he allocated land within Tokwe Grange Farm but identifies the farm as one of the beacons, the other beacons being Godobwe and Ngomahuru Beitbridge Road.

The point, however, is that even the said letter does not support appellants being lawfully entitled to settle in respondent's farm.

It is noteworthy that in the first appellant's opposing affidavit he avers that the second to fifth appellant were allocated the land by Chief Mapanzure. There is no such support on record.

The contentions that the appellants are legally and lawfully settled are not supported. There is mention of the land being land that was acquired by the Government through the land reform programme. There is no document that speaks to this averment.

At p 176 is a notice to cancel deeds of transfer. Included therein is Tokwe Grange and Naffeton said to be registered in the name of Ronald Eustace Vincent. This notice appears as General Notice 67 of 1982 and has nothing to do with the Land Reform Programe which was in any case not yet embarked on in 1982. The fourth ground of appeal speaks to improper citation of the appellants.

What is clear, however, is that these appellants actually exist. This is clear from the opposing affidavits.

In first respondent's affidavits he identified himself as Kennedy Tachiona. Although the respondent had cited him as Chiminya, he clearly gives out that he is not only the first respondent but forges ahead to identify himself by his full names.

I surmise that Chiminya may then be a nickname or a family name by which he is generally known. The second respondent is given as Murahwo. That there is a Eriyon Muravu who deposed to a supporting affidavit leads credence to the fact that that person is second appellant.

The same applies to third to fifth respondents who in their opposing affidavits identify themselves as Chamunorwa Jeriphany Dimbu, Cleopas Mudzviti, Jeriphanos Dimbu and Musekiwa Changamire.

The practicality of it all is that the full names of the appellants is clearly part of the record. It is contained in affidavits by the very persons themselves. I find in circumstances that the appellants are clearly identifiable and the orders can be easily executed upon them to that end. I find that the fourth ground of appeal also falls away.

In the circumstances as already adverted to I am satisfied that respondent has established ownership of the farm, has established his occupation of the said farm and that the appellants had no lawful or legal right to occupy the farm. The appellants have raised a lot of issues which were closely examined by the Trial Court and correctly found not to hold water.

In the circumstances above w

13030e made the following order:-

The appeal be and is thereby dismissed with costs on an ordinary scale.

ZISENGWE J agrees:……

Chihambakwe Law Chambers, appellants' legal practitioners
Chuma, Gurajena and Partners, respondents' legal practitioner